Nos. 79-1538 and 80-231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant,

v.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL.,
Appellees.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.,
Appellants,

v.

STATE OF INDIANA, ET AL.,
Appellees.

On Appeal From the United States District Courts for the Western District of Virginia and the Southern District of Indiana

BRIEF OF AMICI CURIAE NATIONAL COAL ASSOCIATION AND AMERICAN MINING CONGRESS IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI*

Pursuant to Supreme Court Rule 36.2, the National Coal Association and American Mining Congress (NCA/AMC) file this brief on the merits as *Amici Curiae* in support of Appellees. Counsel for all parties have consented to the filing of this brief.

The National Coal Association (NCA) is a trade association whose members comprise a substantial percentage of the Nation's commercial coal-producing capacity. NCA was created to promote and encourage the use of coal; to cooperate with other industries, the public and state and federal officials on problems affecting the production and use of coal; and to promote the general welfare of the producers of coal and related industries on behalf of its member companies.

The American Mining Congress (AMC) is a trade association composed of United States companies that produce most of the Nation's metals, coal and industrial minerals; manufacturers of mining and mining processing machinery, equipment and supplies; and engineering and contracting companies and banks that serve the mining industry. AMC was created to serve as both a clearinghouse for information and a coordinator for action on behalf of the mining industry with regard to matters pending in Congress, the Executive Branch, and independent agencies; and to work for constructive policies that will best enable the mining industry to serve the needs of the Nation.

NCA/AMC and their members are profoundly affected by the legislation which the courts below held unconstitutional in these cases. If the decisions of the lower courts are not upheld, the interests of NCA/AMC will be substantially and adversely affected.

STATEMENT OF THE CASE

Congress enacted an awesomely comprehensive and detailed scheme for the national regulation of surface coal mining and the surface incidents of underground mining, the Surface Mining Control and Reclamation

Act of 1977, 30 U.S.C. § 1201 *et seq.* ("Act"). The measure provoked controversy of considerable intensity through five terms of Congress prior to enactment in 1977. (*See* 79-1538 & 79-1596 Appellant's App. at 1a-4a.)

The lower courts in both the Virginia (No. 79-1538) and Indiana (No. 80-231) cases considered the constitutionality of the Act on a wide range of grounds. As *amici* before this Court, NCA/AMC wish to focus the Court's particular attention on two provisions of the Act—Section 522, 30 U.S.C. § 1272, and Section 521 (a)(3), 30 U.S.C. § 1271(a)(3).

Section 522—entitled "Designating Areas Unsuitable for Surface Coal Mining"—declares mining an unsuitable land use for certain types of lands. Unsuitability is determined either because the land falls within a *per se* unsuitability category prescribed by Congress (§ 522(e)), or because the States make a determination of unsuitability under specific criteria mandated by Congress (§ 522(a)).

Section 521(a)(3), which is one of the "Enforcement" provisions of the Act, permits the summary closure of mining operations by federal inspectors without a hearing whenever a mine operator fails to abate in a timely manner a condition found improper by the inspector. Summary closure under the section is permitted regardless of how limited the potential environmental risks—if any exist[1]—and without re-

[1] For a variety of "technical" violations, there may be no actual environmental or other harm at stake: for example, a violation of the regulation which requires that durable and easily recognized signs be placed at all access points to the permit area, displaying certain identifying information. 30 C.F.R. § 715.12(a)-(b).

gard to whether the operator in good faith has disputed the inspector's findings.

NCA/AMC will address the Tenth Amendment and Fifth Amendment concerns which these two provisions raise. Application of these constitutional principles to these two narrow statutory provisions will hopefully frame issues representative of the wider range of constitutional issues which this Court will address in these cases.

SUMMARY OF ARGUMENT

I.

The unsuitability provisions of Section 522 of the Act have been challenged before this Court under three provisions of the Constitution—the Commerce Clause, the Tenth Amendment and the Fifth Amendment. With respect to Tenth Amendment issues on which this *amicus* brief will focus primarily,[2] the provisions of Section 522 are unconstitutional in two somewhat different respects.

First, Section 522(e)(4)-(5), which bans any mining within precisely 100 feet of a road, precisely 300 feet of a building, etc., represents an unconcealed effort to zone the local use of land—an objective absolutely unrelated to any federal interest. Section 522 (e)(5)'s prohibition of mining within precisely 100 feet of a cemetery, for example, has no relation to the environment, and no relation to any Commerce Clause concern; rather, it is a local land use statute imposed

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[2] NCA/AMC fully support appellees' claims of unconstitutionality under the Commerce Clause and Fifth Amendment but wish in the interest of space to direct principal attention toward Tenth Amendment arguments.

without variation by Congress on all States as to a matter of uniquely local concern. The Tenth Amendment prohibits so extraordinary an intrusion into matters traditionally local in nature.

Second, Section 522(a) provides an alternative scheme under which States may identify and declare certain historic, natural or other lands unsuitable for mining. The Tenth Amendment deficiency in this provision relates not to the fact that Congress has mandated any particular land use (the determination of whether to prohibit mining is actually left to the State) but to Congress' insistence that the federal government set all the rules by which this state determination will be made. And if the States fail to adopt any of these rules, the federal government itself must evaluate and declare private lands unsuitable for mining. Imposition of this federal control of the state decisionmaking process, although less direct, is a similarly invidious Tenth Amendment intrusion.

In addition to Tenth Amendment concerns, Section 522 raises unconstitutional "taking" issues under the Fifth Amendment which will also be briefly discussed.

II.

Section 521(a)(3) permits a federal inspector to shut down a mining operation without a hearing under circumstances which violate the Due Process Clause of the Fifth Amendment. Under the Act, the mine closure order will be issued whenever a mine operator fails to abate a violation alleged by the inspector during a prior visit to the mine site. Since other mechanisms are readily available to the government to advance any real need for immediate corrective

action, and because provision of a prior hearing will entail no significant additional governmental cost or administrative burden, a hearing is required by the Due Process Clause before the government shuts down a mine under Section 521(a)(3).

ARGUMENT

I. SECTION 522 EXCEEDS CONSTITUTIONAL LIMITATIONS IMPOSED BY THE TENTH AND FIFTH AMENDMENTS

Section 522 [3] has two basic thrusts. In Section 522 (e), Congress flatly prohibited surface mining [4] on an extensive variety of categories of lands. Included within the areas Congress dictated could not be used for mining are lands within 300 feet from occupied dwellings, public buildings, schools, churches, community or institutional buildings, and parks, as well as lands within 100 feet of the outside right-of-way line of any public road and within 100 feet of a cemetery. Section 522(e)(4)-(5).

Section 522(a), (c) and (d) (hereinafter referred to collectively as "(a)") operate differently. Rather than directly dictating land uses as in Section 522(e), in Section 522(a) Congress dictated the governmental processes by which States must make such determinations.[5] Congress demanded that each State establish a

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[3] We refer broadly to Section 522 but do not argue, and the courts below did not hold, that Section 522(b)'s provisions concerning federal lands are unconstitutional.

[4] Surface mining is broadly defined in the Act to include a wide range of collateral activities and areas, including the surface incidents of underground mining. *See* Section 701(28).

[5] Although phrased conditionally ("To be eligible to assume primary regulatory authority pursuant to section 503, each State shall . . ."), Section 522(a)'s command is actually mandatory. If a

process for land use analysis and decisionmaking, including "methods for implementing land use planning decisions" concerning mining. Section 522(a)(1)-(4). Congress mandated the rule of decision to be followed: Section 522(a)(2) requires the State to prohibit all or certain types of surface coal mining in areas additional to those already congressionally zoned against mining under Section 522(e) if the State determines that the reclamation required by the Act would not be feasible on those lands. In addition to Section 522 (a)(2)'s rule of decision, Section 522(a)(3) provides other criteria under which the State is granted discretion to prohibit mining on yet other categories of lands.

We believe the courts below correctly declared Section 522 unconstitutional. This statute probably exceeds even the plenary authority granted Congress under the Commerce Clause, but it surely violates both the Tenth Amendment and the Taking Clause of the Fifth Amendment. We focus our arguments on the Tenth Amendment as the constitutional provision most critically impaired when Congress asserts authority to zone the private land around local parks and cemeteries.

A. The Act Violates the Tenth Amendment.

Even if Section 522 might otherwise be sustained as a legitimate exercise of the commerce power,[6] it

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State does not obey the dictates of Section 522(a), the federal government will itself perform the function and make these land use decisions for the State and its localities. Sections 503, 504 (a)-(b).

[6] It should not be sustained under the Commerce Clause, however. Section 522(e) lacks the telic relation to legitimate federal

must be invalidated under the Tenth Amendment. Section 522 presents a very specific intrusion into traditional state regulation of land use. At issue, for example, with respect to Section 522(a)(4) are very localized concerns: should mining—which under Section 701(28) of the Act may involve simply the storage of supplies or other limited activities—be prohibited within precisely 100 feet of a public road? Or should it be prohibited within 500 feet or some other distance of such a road? Section 522(e)(5) presents similar questions of local concern: how close to a cemetery, for example, does a local community wish mining to proceed? If Congress can prohibit mining near cemeteries, what about other business activities or private uses?

The intrusion of Section 522(a), although different in kind, is similar in effect. Under the Department of Interior's applicable regulations,[7] broad categories of land (defined in 30 C.F.R. § 762.5) must be evaluated by state regulatory authorities through a process that must include petition rights to private parties, detailed record keeping requirements, notification requirements, detailed procedures for processing petitions, detailed procedures for conducting hearings before local authorities, detailed procedures for reaching decisions based on the materials presented at such hearing, and the creation of a data base and inventory system for evaluating all lands which could potentially be covered by petition. 30 C.F.R. § 764. Under Section

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concerns necessary to sustain it. *See McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819); D. Engdahl, *Constitutional Power: Federal and State, in a Nutshell* 33-34 (1974).

[7] States must adopt these regulations if they are to avoid direct federal determination of what lands are suitable for mining (Section 504).

504 of the Act, a failure of any State to enact any of these provisions in a form at least as stringent as the federal form[8] will result in imposition of a "federal program" under which the federal government will make its own decisions as to which state lands should be designated unsuitable for mining.

The intrusion on States' sovereignty here is pervasive and extreme. In order to evaluate this intrusion under the Tenth Amendment, we must deal first with the general principles which govern applicability of the Tenth Amendment and then more specifically with the particular respects in which Section 522 offends those principles.

1. *The Tenth Amendment Limits the Commerce Power.*

The Tenth Amendment operates as a limit on the federal power over interstate commerce. In *Fry* v. *United States,* 421 U.S. 542 (1975), Justice Marshall's opinion for the Court declared of the Tenth Amendment:

> [I]t is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.

421 U.S. at 547 n.7. Subsequently, in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), the Court invalidated an exercise of congressional power admittedly otherwise authorized by the Commerce Clause because it transgressed considerations of federalism and state sovereignty protected by the Tenth Amendment.

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[8] The stringency requirement is reflected in Section 505 of the Act.

Japan Line, Ltd. v. *County of Los Angeles,* 441 U.S. 434, 449 n.13 (1979).

Although the precise contours of these Tenth Amendment limitations must be evaluated in the balance of governmental interests particular to each case, they emerge from venerable principles: that Congress may not "curtail in any substantial manner the exercise of [State] Powers," *Metcalf & Eddy* v. *Mitchell,* 269 U.S. 514, 523 (1926); that Congress may not diminish those powers and " 'functions essential to [the States'] separate and independent existence,' " *Coyle* v. *Smith,* 221 U.S. 559, 580 (1911), quoting from *Lane County* v. *Oregon,* 74 U.S. (7 Wall.) 71, 76 (1868); that there are "attributes of sovereignty attaching to every state government which may not be impaired by Congress," *National League of Cities,* 426 U.S. at 845; and that there must be "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger* v. *Harris,* 401 U.S. 37, 44 (1971).

2. *The Act Exceeds Tenth Amendment Limitations.*

Section 522[9] of the Act offends constitutionally protected principles of federalism and state sovereignty in a number of ways. It usurps traditional state au-

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[9] Some of the arguments below are more applicable to Section 522(a) than (e) and vice versa. It is difficult, however, to distinguish where the constitutional offenses of the one leave off and those of the other begin and we generally have not attempted to do so.

thority over land use, it disrupts the State's exercise of its police powers to promote local community values, it subverts the State's authority over its range of taxing options particularly with respect to property taxes, and it dictates the processes which must govern a State's resolution of inherently state-related issues. One hundred senators and 435 congressmen may well have opinions on these matters as indeed they may have opinions on other matters of local concern such as the zoning of building heights, the creation of state amusement facilities, and the like. The inherently localized nature of these questions, however, overrides whatever federal interest there may be—if any—in imposing these opinions on each local authority.[10]

a. Usurpation of traditional local authority.

One way in which the Act offends state sovereignty and considerations of federalism is Section 522(e)'s intrusion into and usurpation of traditional local control over land and land use within state boundaries. In contrast to the federal government's lack of a general property power and lack of any historical re-

[10] Congress is not without alternative constitutional powers to obtain protection of whatever environmental or other interests may have prompted Section 522. Any land within the categories designated by Section 522 can still not be mined unless the mine operator complies with each of the stringent performance, permitting, bonding and other statutory and regulatory requirements implemented under the Act. Under the umbrella of congressional concern for effective reclamation of mined lands, however, Congress has sought to impose, through Section 522, Congress' own judgment that some lands—for health, safety or aesthetic reasons—ought not to be mined at all. The function of determining what activities should be permitted on what lands is a uniquely local function, tied to the requirements of the locality, and traditionally exercised by local governments under state authority.

sponsibility for real property law, the States and their subordinate localities have always been intimately connected with and responsible for the land and its regulation.[11]

The relationship of state and local governments with the land is multi-faceted and the facets themselves highly interdependent. The State, as successor to the Crown after the revolution, is the source and arbiter of rights in land, determining the incidents of ownership and how they may be conveyed or succeeded to. The State is the source and arbiter of the private law which regulates conduct, *inter alia,* with respect to the land, including the law of nuisance. Congress, in Section 522, interjects itself disruptively into this special relationship between the States and their lands.

b. Disruption and destruction of local government and self-determination.

The police power[12] of the States has long been applied to regulate the use of land for the protection of the public health, safety and welfare, as locally defined. *See, e.g., Welch* v. *Swasey,* 214 U.S. 91 (1909); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915); *Thomas Cusack Co.* v. *City of Chicago,* 242 U.S. 526 (1917). Local governments, increasingly over most of this century, have employed the police power to control

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[11] The primacy of each State in governmental matters relating to land within its bounds is illustrated by the conflicts of laws principles governing real property issues. *See, e.g., Restatement (Second) of Conflict of Laws,* Ch. 9, Topic 2, Introductory Note (1971).

[12] *Amici* National Wildlife Federation ("NWF"), *et al.,* find constitutional authority for the Act in the *federal* "police power." (NWF Br. at 25.) We search our copy of the Constitution in vain for the source of this alleged federal power.

land use patterns through zoning regulations and comprehensive planning. *See, e.g., Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926).

Local governments have thus been responsible for and capable of protecting or promoting community values as locally deemed necessary. This traditionally exclusive power over local land use and development has enabled a community to pursue a particular locally-chosen style or quality of life. *Compare Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974) *and Agins* v. *City of Tiburon,* 100 S. Ct. 1832 (1980) *with Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104 (1978).

Thus, Section 522 not only usurps an area of traditional State and local function. It also threatens the identity of localities by dictating from Washington which lawful land uses may be conducted where, notwithstanding the values, preferences, and needs of people in those localities. More offensive yet, Congress threatens the very capacity for community self-determination and the viability of local democratic processes in shaping the community destiny. *Cf. James* v. *Valtierra,* 402 U.S. 137, 143 (1971). "This Court has emphasized the importance in a democratic society of preserving local control of local matters." *City of Rome* v. *United States,* 100 S. Ct. 1548, 1575 n.12 (1980) (Powell, J., dissenting).

c. Subversion of state and local fiscal viability.

A third major way in which the sovereignty and independence of the States are undermined stems from the threat to their fiscal viability which Section 522 represents. Among the critical variables inherent in

the land use decisionmaking calculus is the value of the property under different uses. The economic value of property will vary according to the use to which the land is or may be put. The importance to state and local governments of this variable in land use decisionmaking derives primarily from its effect on the property tax revenues on which they depend.

Ad valorem taxation of real property has, since the founding of the Republic, been the foundation of state and local fiscal integrity. It is beyond the constitutional reach of the federal taxing power and susceptible to plenary local control. The property tax is relatively highly correlated with benefit-burden taxation equity considerations with respect to local governmental services. It is the primary source of funding for traditional local services. Moreover, it facilitates local self-determination, permitting communities to make reasoned choices, for example, about how much they value parks and open spaces in lieu of other services or as compared with other land uses which would carry a larger share of the local tax burden. *Cf. Milliken* v. *Bradley,* 433 U.S. 267, 291 (1977); *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973); *James* v. *Valtierra,* 402 U.S. 137, 143 (1971).

Although the degree of reliance on the property tax has diminished somewhat in recent decades, the property tax remains the overwhelming source of tax revenues for local governments. From 1942 when 92.4 percent of local tax collections came from the property tax, 79.7 percent of those collections were supplied by the property tax nationwide in 1978.[13] Advisory Com-

[13] Local governments in some states depend on the property tax to a lesser degree, of course, while in other states, it is their only

mission on Intergovernmental Relations, *Significant Features of Fiscal Federalism, 1979-80 Edition* 88 (1980). Although state governments themselves have decreased their dependence on the property tax over the same period, still more than a third of all state and local tax collections were furnished by the property tax in 1978. *Id.* at 87.

When the Congress interjects itself into the local land use decisionmaking process and dictates what private lands can be used for what purposes, it not only usurps traditional local authority but it strips away some further measure of a community's control over its destiny, and it threatens its very capacity for fiscal—and therefore functional—independence and viability. Constitutional principles of intergovernmental tax immunity testify to the critical nature of this federal intrusion. *See Massachusetts* v. *United States,* 435 U.S. 444, 453-60 (1978) (Brennan, J.).

d. Dictating state processes and decisions.

When Congress orders States, as it does in Section 522(a), to make certain land regulatory decisions and specifies how to do so, complete with which sorts of exceptions the State may permit (*e.g.,* Section 522 (a)(6)), it offends the Tenth Amendment in a fourth way. Congress, having decided for the States that land cannot be mined if it cannot be returned to its premining state (including its original contour), has dictated that each State must conduct a particular process of land use decisionmaking, in a State level agency, with particular administrative capabilities and re-

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effective revenue-raising device. *See* Advisory Commission on Intergovernmental Relations, *Significant Features of Fiscal Federalism, 1979-80 Edition* 88 (1980).

sources, staffed to the satisfaction of the Secretary of the Interior,[14] to operate in a particular manner "implementing land use decisions" reached by application of congressionally mandated decisional criteria. Section 522(a)(1)-(4). It is beyond question that this is a constitutionally forbidden exercise of congressional power "so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." *National League of Cities*, 426 U.S. at 855.[15]

This is entirely different than the situation the Court faced in *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127 (1947). The federal imposition of Hatch Act requirements on state personnel systems there was upheld as a legitimate exercise of the federal spending power. Here, the States have no choice; they suffer the federal intrusion not as a price which must be paid to secure federal funds. The only choice a State has is to comply or be stripped of its traditional internal

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[14] *See, e.g.*, 30 C.F.R. § 731.14(i)-(k) (detailing what staffing information the State must furnish the Secretary).

[15] In a penetrating article, "Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy," 86 Yale L. J. 1196 (1977), considering the "near-plenary" power of Congress to require pollution control by private sources, Professor Richard Stewart noted:

> But the matter would be very different were Congress to invoke the commerce power as a justification for compelling state and local governments to implement federal environmental policies. There is no close precedent, historical or legal, supporting such an undertaking.

Id. at 1222, 1223. *See District of Columbia* v. *Train*, 521 F.2d 971, 992-95 (D.C. Cir. 1975), *vacated and remanded per curiam sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977) (Tenth Amendment prevents "compelled state regulation" and "forcing the states to supplant federal officials in policing the details of federal regulations").

administrative autonomy and control over local land by imposition of a "federal program" for that State. Section 504.

Professor Tribe has observed, with particular significance to this case,

> [N]o one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions—in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell.

L. Tribe, *American Constitutional Law* 302 (1978). Here, Congress has gone beyond nibbling and feeds at the throat of our federal principles. *See Rizzo* v. *Goode,* 423 U.S. 362, 379 (1976); *see also* Stewart, "Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy," 86 Yale L.J. 1196, 1219-1250 (1977).

Even if the Court were to employ a balancing approach, *see National League of Cities,* 426 U.S. at 856 (Blackmun, J., concurring), Section 522 of the Act could not survive Tenth Amendment challenge. The fundamental nature of the jeopardy to which Section 522 subjects the constitutional interest in unimpaired state sovereignty in a federal system outweighs whatever incremental protection it might afford legitimate federal environmental concerns and interstate commerce.

This is particularly so because Section 522 advances its purposes so clumsily and crudely. Under Section 522(a) and applicable regulations (30 C.F.R. Part 764), state procedures for designating lands unsuitable for mining are prescribed down to the finest de-

tails. Where vulnerable Tenth Amendment values are so thoroughly implicated, federal power must be exercised with greater sensitivity and delicacy to minimize unnecessary damage to those values. *See Fry,* 421 U.S. at 547 n.7; *National League of Cities,* 426 U.S. at 853; *Younger* v. *Harris,* 401 U.S. at 44.

The "balance" is further skewed against Section 522 because there are less intrusive alternatives—and the Act itself employs them. Problem-specific, particularized environmental and health and safety protections are provided by the Act's permitting, bonding, and enforcement processes. *See, e.g.,* Sections 506-509, 520-521. In contrast, Section 522's meat axe approach—like that of several other sections of the Act such as the approximate original contour, steep slope, and prime farmland dictates[16]—"*unduly* interfere[s] with the legitimate activities of the States." *Younger* v. *Harris,* 401 U.S. at 44 (emphasis added).

B. Section 522 Violates the Fifth Amendment.

We adopt the arguments advanced by appellees that Section 522 also violates the Taking Clause of the Fifth Amendment. We here only emphasize for the Court that Section 522(e)'s "valid existing rights" exemption, at least as interpreted and implemented by Secretary Andrus, does not save that section from constitutional defect.[17] In addition, we wish to point out a unique factual consideration which is at the heart of the

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[16] The constitutionality of these other provisions will be discussed by other parties.

[17] By regulation, the Secretary defined "valid existing rights" so arbitrarily and restrictively as almost to constitute a null set. *See* 30 C.F.R. § 761.5. Although acknowledging that Congress intended,

"taking" issue. In the mining industry, mine operators frequently purchase property rights only in the underlying coal seam rather than in the surface. They own the coal, not the land. Where this is true, the prohibition of mining represents a complete taking of an operator's entire interest in coal. This widespread mining practice of acquiring only the coal rights makes *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922), the governing precedent, as distinguished from *Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104 (1978). The *Mahon* fact pattern is virtually identical to the issues raised by Section 522(e)(5). Effectively prohibiting any return on an operator's investment in severed coal rights, Section 522(e) deprives such property owners of the whole "bundle" of rights, not just one strand, and thus effects an unconstitutional taking. *See Andrus* v. *Allard,* 444 U.S. 51, 65 (1979).

II. THE DISTRICT COURT PROPERLY ENJOINED SECTION 521(a)(3) SUMMARY CESSATION ORDERS

The Act provides, in two circumstances, for summary issuance of orders requiring the immediate cessation of surface coal mining operations. Section 521(a)(2) requires issuance of a cessation order when a federal inspector determines that a condition or practice creates an imminent danger to public health

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by the exemption, to avoid taking property unconstitutionally, 44 Fed. Reg. 14992 (1979), the Secretary superimposed prerequisites with no Fifth Amendment basis. The United States District Court for the District of Columbia declined to reach the constitutionality of this regulation in *In Re Permanent Surface Mining Regulation Litigation,* C.A. No. 1144 (Feb. 26, 1980) and NCA/AMC's appeal of that ruling is pending before the Court of Appeals (No. 80-1810 *et al.*).

or safety or threatens imminent environmental harm. Section 521(a)(3) requires issuance of a cessation order for failure to abate an alleged violation, though the alleged violation creates no risk of imminent harm to people or the environment.

The District Court in Case Nos. 1538 and 1596 enjoined both varieties of summary cessation order on due process grounds. (1538 J.S. App. at 12a, 19a, 62a.) The Secretary has briefed only Section 521(a)(2) and we leave response to his argument to other litigants. We here address only the unconstitutionality of Section 521(a)(3).

Under Section 521(a)(3), in the absence of a condition posing an imminent danger to public safety, health, or the environment, a federal inspector who believes that a condition or practice violates the Act or a condition of the mining permit issued thereunder "shall issue" the permittee a notice of violation ("NOV"). The NOV sets a "reasonable time" for abatement of the violation—"but not more than ninety days"—and provides "opportunity for public hearing." *Id.*

The permittee may dispute the inspector's appraisal of the condition or practice: as a matter of its factual existence, its incidents, what must be done to constitute abatement to the inspector's satisfaction or the meaning or scope of the requirement which has been allegedly violated. It may be enormously, even prohibitively, expensive to do what the inspector believes is required for abatement, in which case, if he has any doubt the inspector isn't correct in all material respects, the permittee will likely want to contest the NOV and not abate the condition until adjudicatory

fact finding is complete and someone more knowledgeable in the law than the inspector tells the permittee he is wrong and must abate.

If the permittee believes that the NOV is improper and chooses not to abate, challenging the NOV and seeking an adjudicatory hearing by a neutral fact-finder under Section 525(a)-(b), he subjects himself to the possibility that, in the meantime, the inspector will shut down his mine with a Section 521(a)(3) cessation order. Even if the inspector, in his discretion, extends the abatement time to the maximum period, it is likely that time will run before the permittee's challenge is adjudicated. The more minor the violation, the shorter the abatement time the inspector will permit and, ironically, the more likely the mine will be shut down for failure to abate, without a hearing.

Consider the example of one of the more hotly contested issues which has arisen under the Act's interim regulatory program: the determination of which off-minesite coal processing facilities are subject to regulation. The Interior Board of Surface Mining and Reclamation Appeals has considered the issue over the last two years, evolving case-by-case a set of criteria for distinguishing coal processing facilities subject to the Act from those which are not.[18] Considering the

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[18] In June, 1979, the Interior Board of Surface Mining and Reclamation Appeals (Board) reversed the February 9, 1979 ruling of its administrative law judge that the coal processing facility operated by Western Engineering, Inc. was subject to regulation under the interim program. *Western Engineering, Inc.*, 1 IBSMA 202, 86 Int. Dec. 336 (1979). Since *Western Engineering*, the doctrine governing Office of Surface Mining jurisdiction over coal processing facilities has been substantially refined by the Board. *See, e.g., Virginia Iron, Coal and Coke Co.*, 2 IBSMA 165, 87 Int. Dec. 327 (1980); *Drummond Coal Co.*, 2 IBSMA 189, —— Int. Dec.

costs of compliance with the Secretary's regulations, the consequences of this determination are enormous for a facility operator.

A federal inspector, arriving at a coal processing facility, must make a complex determination whether the facility is subject to the Act.[19] Recognizing the unsettled and ambiguous nature of the calculus used to determine whether a particular facility must comply with the Act, an operator may well resist an inspector's NOV for failure to comply with some or all of the regulations and refuse to abate the alleged violation pending a full hearing of the issue. This reasonable reaction, however, exposes the operator to a cessation order under Section 521(a)(3) and to consequent economic loss, though the inspector may be proved wrong and the NOV invalidated after a hearing.

Alternatively, a permittee may believe that he has done all that is necessary to abate the alleged violation but the inspector disagrees, taking a different view of the facts or the requirements of the law in the matter. If the time for abatement has run, "[the inspector] shall immediately order a cessation" of mining. Section 521(a)(3).

—— (1980) (Drummond II); *Bethlehem Mines Corp.*, 2 IBSMA 215, —— Int. Dec. —— (1980); *Roberts Bros. Coal Co.*, 2 IBSMA 284, —— Int. Dec. —— (1980).

[19] If the inspector is familiar with the latest developments in the administrative case law, he will consider the distance in miles between the facility and the mine which supplies it with coal, the number of different mines supplying coal, and what economic nexi those mines have with the facility, whether the facility is functionally integrated with or otherwise operated in connection with nearby surface coal mines, and so on. *See, e.g., Roberts Bros. Coal Co.*, 2 IBSMA at 289-93, and the dissenting opinion of Judge Mirkin, 2 IBSMA at 296-97.

Although the permittee—*after* his mine is closed—may seek temporary relief from the Secretary (Section 525(c)) and, subsequently, from a court (Section 526 (c)), and has a right to an informal hearing (without a neutral factfinder) within thirty days (Section 521 (a)(5)), even if he prevails and the cessation order is stayed or revoked, he could be out of business. As the court below correctly found, many small coal companies operate very close to the margin and a few days' loss of production can make the difference between viability and bankruptcy. (*See* 79-1538 J.S. App. at 71a.)

Whether Section 521(a)(3) cessation orders constitutionally may issue without prior notice and opportunity for a hearing may be determined by resort to the balance of interests test established in *Mathews* v. *Eldridge,* 424 U.S. 319, 335 (1976). Under *Eldridge,* the Court must weigh three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

As to the first of these factors, *i.e.* the private interest at stake, the economic hardship on a mine operator can be enormous. Lost production will generally be valued at thousands of dollars a day, sometimes tens of thousands.

As to the second factor, *i.e.* the risk of erroneous deprivations under the present scheme, one inspector evaluating complex environmental conditions and applying somewhat amorphous concepts of environmental regulation in a new, largely untested scheme is far more prone to error than an administrative law judge who has had the benefit of adversary proceedings and expert testimony.

As to the third factor, the Government's interest in obtaining prompt abatement of improper practices or conditions is already protected by Section 518(h)'s provision for minimum daily penalties of $750 for each day of non-abatement after the date set in the NOV.[20] Moreover, if the need for expeditious action to protect the environment or public health and safety arises, that interest is already being fully protected by Section 521(a)(2)'s provision for imminent danger orders[21] and Section 521(c)'s provision for civil actions for judicial relief, including temporary injunctive relief.

Moreover no added fiscal or administrative burden must be incurred by the government to afford the permittee an adjudicatory hearing on the validity of the NOV or the adequacy of abatement before it orders cessation of mining for failure to abate. The hearing is statutorily already provided for.[22] Merely its *timing*

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[20] Criminal sanctions are also available as a deterrent to willful violations of the Act or permit conditions or noncompliance with a cessation order, *inter alia*. *See* Section 518(e)-(f), 30 U.S.C. § 1268(e)-(f).

[21] We acknowledge that this provision may also be unconstitutional, as argued by other parties.

[22] Actually, two different hearings are potentially provided, one to review the NOV and one to review the cessation order after the fact. Section 525(a)-(b), 30 U.S.C. § 1275(a)-(b).

must be adjusted relative to the occurrence of economic deprivation under a cessation order. Since no significant governmental interest is jeopardized by the altered sequence, due process requires it here.

The balance is one-sided. Due process requires a hearing before the Secretary may shut down a mine for failure to abate an alleged violation of a permit or the Act. Section 521(a)(3) provides otherwise and is unconstitutional.

CONCLUSION

For the reasons more specifically set forth above, NCA/AMC request that Sections 522(a), 522(e)(4)-(5), and 521(a)(3) be declared unconstitutional and the decisions below affirmed.

Respectfully submitted,

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